

1 Honorable Mary Jo Heston
2 Chapter: 11
3 Hearing Date: April 10, 2024
4 Hearing Time: 11:00 a.m.
5 Location: Courtroom H, Union
6 Station, Tacoma Washington

7

8 **IN THE UNITED STATES BANKRUPTCY COURT FOR THE**
9 **WESTERN DISTRICT OF WASHINGTON**

10 In re:

11 Vandevco Limited and Orland, Ltd.,

12 Debtor(s).

Case No. 20-42710-MJH (Lead Case)

Case No. 20-42711-MJH (Jointly
administered)

13 **UNITED STATES**
14 **TRUSTEE'S STATEMENT ON TIMING**
15 **OF APPOINTMENT OF A CHAPTER 11**
16 **TRUSTEE**

17 Acting United States Trustee for Region 18, Gregory M. Garvin ("U.S. Trustee"), hereby
18 presents his statement on whether the Court should order the appointment of a chapter 11 trustee.
19 Debtors are facing their second major sanction related to discovery, and due to this delay, there
20 are serious questions as to whether Debtors, and their counsel, can be relied upon to timely
prosecute this case. Therefore, resolution of this case likely requires the appointment of a Chapter
11 trustee; however, the timing of the appointment largely depends on the sanctions issued by the
Court and the complexity of the issues that remain after the Court's ruling.

21 **A. BACKGROUND**

22 The Debtors are facing a second motion for sanctions after years of litigation that has led
23 to almost no substantive progress in this case. While the cause and effect of Debtors' most recent
24 production issues are unclear, the other facts that confirm the necessity of a trustee appear to be
undisputed.

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1 On July 29, 2021, the Court ordered the appointment of an examiner to determine:

- 2 1. Whether [Belbadi Enterprises, LLC (“Belbadi”)] is in possession of records
3 belonging to the Debtor that have not been turned over in discovery;
- 4 2. Whether the Debtors have had control over any such records from the time Cerner
5 Middle East [(“Cerner”)] commenced its U.S. litigation on July 20, 2016, through
to the present; [and]
- 6 3. Whether Belbadi is, controlling what discovery the Debtors are producing.

7 ECF #520, pg. 2. Thereafter, on December 9, 2021, Judge Randall J. Newsome, Retired, was
8 appointed examiner (the “Examiner”). ECF #528.

9 The Examiner issued his report on February 25, 2022, and found (1), that there was no
10 clear line between Debtors’ corporate records and those of its corporate parent (ECF #614, pg. 13);
11 (2) that at least until December 2017, when Ziad Elhindi (“Elhindi”), who was also the sole
12 director/officer/manager/member of the Debtors, resigned from his position as CEO of Belbadi,
13 Debtors had control over Debtors’ and Belbadi’s corporate records (*id.* pg. 14) but did not collect
14 or retain them (ECF #691, pg. 4); and (3) that Belbadi was not controlling discovery and that
15 Debtors had produced all non-privilege documents in their possession. ECF #614 pg. 15.
16 Furthermore, the Court found that as of July 20, 2016, the date Cerner filed its lawsuit against
17 Debtors, that “the Debtors had a duty to preserve the [electronically stored information (“ESI”)]”
18 from Elhindi’s Belbadi email account (the “Belbadi Account”). ECF #691, pg. 8.

20 Approximately one month after the Examiner issued his report, Cerner filed a motion to
21 compel turnover of Debtor’s books and records (the “Motion to Compel”). ECF #661. On April
22 12, 2022, Debtors filed their response to the Motion to Compel, stating that, “Belbadi has made
23 abundantly clear that it would neither participate in the litigation of Cerner Middle East’s claims
24 nor respond to its demands for discovery,” and that the lack of discovery was due to, “[t]he limits
of the forum in which Cerner Middle East has relentlessly sought to litigate.” ECF #676, pg. 20.

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1 The Court held a hearing on the Motion to Compel on April 19, 2022, and issued its written
2 decision on April 26, 2022.

3 The Court did not adopt Debtors' arguments. In ruling on the Motion to Compel, the Court
4 stated that, “[d]espite the Examiner’s Report being filed two months ago, the Debtors have yet to
5 take responsibility for their failure to preserve their records, acknowledge any prejudice created
6 by the spoliation, or offer any remedy to mitigate the prejudice.” ECF #691 at 14. As a result, the
7 Court awarded fees and cost to Cerner, “incurred in bringing the Motions to Compel and appearing
8 at the April 19, 2022, hearing.” *Id.* The Court ultimately awarded Cerner \$114,877.00 for its time
9 and expenses. ECF #743. Thus, while Debtor’s failure to preserve ESI caused the problem, it was
10 Debtors’ post-petition inaction that unnecessarily cost the estate \$114,877.00. *Id.*

11 In the order on the Motion to Compel, the Court also ordered production of documents
12 from the Debtors within 30 days, or they would face additional evidentiary sanctions. ECF #691,
13 pg. 16. This deadline was ultimately extended by agreement to May 1, 2023. ECF #937. Non-
14 expert Discovery cutoff was then set as March 13, 2024. ECF #1307. Per the declaration of Garret
15 S. Garfield, Debtors produced approximately 38,000 pages of documents on or around May 10,
16 2023, with a much smaller, supplemental production, of 125 pages being made on or around
17 August 8, 2023. ECF #1326, pg. 1.

18 Debtors then turned over 30,000 additional pages of documents on or around March 8,
19 2024, and then a further 30,000 documents on or around March 13, 2024. *Id.* pg. 2. At least some
20 of the documents appear to be relevant and were not produced elsewhere. *See* ECF #1325, pg. 9.
21 While the volume of the production at such a late date is itself prejudicial and has caused needless
22 expense and delay, the totality of the harm is impossible to measure until either Cerner or Debtors
23 introduce evidence regarding the contents of the additional documents.

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1 Further, Debtors have yet to fully articulate why they did not turn these documents over
2 earlier. Debtors' justification for their late production of documents is that they were only
3 "supplementing" their production of the 30,000 original documents when they produced the
4 60,000 additional documents. Debtors repeatedly refer to the 60,000 documents as a
5 "supplemental production," (see e.g. ECF #1329), likely to downplay their failure and counsels'
6 failure to comply with discovery. Furthermore, Debtors seem to discount the harm or prejudice
7 they caused because, "Cerner Middle East was indisputably on notice that a supplemental
8 production was forthcoming." ECF #1329, pg. 4.

9
10 Excuses aside, Debtors have undisputedly caused the cancelation of the evidentiary hearing
11 set for April 29, 2024, and further delayed resolution of the fundamental issue in this case from
12 day one – does Cerner Middle East hold a claim against these Debtors? However, yet to be
13 resolved is Debtors' culpability and the total cost to the parties in terms of adverse evidentiary
14 rulings, monetary sanctions, and lost time and expenses. Unfortunately, a Chapter 11 trustee will
15 have difficulty answering these questions and cannot be expected to step into a case after the April
16 10th hearing ready to litigate these issues within a few weeks.

17 Therefore, the U.S. Trustee would prefer that the discovery issues be addressed first. The
18 sanctions imposed by the Court on the Debtor may negate the need for an evidentiary hearing.
19 Thereafter, if no further questions about production remain (because, for example, the Court issues
20 a terminating sanction as to the issue of the Debtors liability to Cerner Middle East) then a Chapter
21 11 Trustee could, and should, be appointed immediately without further delay to step in and finally
22 resolve this case.

23 However, if the Court wants to set further hearings as to the discovery issues or wants the
24 evidentiary hearing to go forward, the U.S. Trustee would like to hear the expected parameters of

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1 such proceedings and what role a Chapter 11 trustee could, or would, be expected to play in them,
2 before taking a position on whether a trustee should be appointed now or later.

3 **B. ANALYSIS**

4 A. Grounds Exist to Appoint a Trustee

5 Debtors' gross mismanagement of the litigation requires the appointment of a trustee. The
6 court shall order the appointment of a trustee --

7 (1) for cause, including fraud, dishonesty, incompetence, or gross
8 mismanagement of the affairs of the debtor by current management, either before
9 or after the commencement of the case, or similar cause, but not including the
10 number of holders of securities of the debtor or the amount of assets or liabilities
of the debtor.

11 U.S.C. § 1104(a)(1). The Court is not limited to the enumerated "causes" when deciding
12 whether to appoint a chapter 11 trustee. The terms "include" and "including" are not limiting. §
13 102(3).

14 Other factors relevant to the appointment of a trustee under Section 1104(a)(1)
15 include "conflicts of interest, including inappropriate relations between corporate
16 parents and the subsidiaries; misuse of assets and funds; inadequate record keeping
17 and reporting; various instances of conduct found to establish fraud or dishonesty;
and lack of credibility and creditor confidence. A court may consider both the pre-
18 and post-petition misconduct when making the determination that "cause" exists
for the appointment of a trustee."

19 *In re Klaynberg*, 643 B.R. 309, 318 (Bankr. S.D.N.Y. 2022) (internal citations omitted).

20 In the present case, the Court has already found Debtors failed to keep or preserve
21 adequate pre-petition records when Elhindi left the Debtors. Specifically, the Examiner found,
22 and the Court agreed, that there was no clear line between Debtors' corporate records and those
23 of its corporate parent (ECF #614, pg. 13), and that Debtors had a duty to preserve ESI after the
24 filing of Cerner's lawsuit, but that Debtor failed to collect or retain those records. *Id.* pg. 14.

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1 Debtor's failure to keep or preserve these records has added to the complexity and expense of the
2 ongoing litigation with Cerner.

3 Further, post-petition, Debtors resistance to discovery after voluntarily commencing these
4 cases has cost the estates \$114,887.00 in discovery sanctions. ECF #743. These fees and costs
5 were awarded, in part, because Debtors did not, "take responsibility for their failure to preserve
6 their records, acknowledge any prejudice created by the spoliation, or offer any remedy to
7 mitigate the prejudice." Instead, Debtors blamed Belbadi and "[t]he limits of the forum in which
8 Cerner Middle East has relentlessly sought to litigate." ECF #676, pg. 20.
9

10 Now, for a second time, Debtors are facing sanctions for their discovery conduct, and once
11 again Debtors do not acknowledge the prejudice. Instead, Debtors try to characterize the
12 production of 60,000 documents as a supplement. While sanctions for this current issue have not
13 yet been determined, at a minimum, the hearing scheduled for April 29, 2024, has been taken off
14 the calendar. As a result, many hundreds of thousands of dollars' worth of time have potentially
15 been wasted. Debtors' failure to mitigate, or even acknowledge these issues in their written
16 pleadings, plus the actual monetary damages they have caused to the estate, are cause to appoint
17 a chapter 11 trustee.
18

19 However, as stated above, the timing of when the Court should order such appointment
20 should be determined after the discovery issues are resolved and the next steps to resolve Cerner
21 Middle East's potential claim have been more clearly defined.
22

23 WHEREFORE, the United States Trustee respectfully requests that the Court order, at an
appropriate time, that a chapter 11 trustee be appointed.
24

DATED this Monday, April 1, 2024,

Respectfully submitted,

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